No.

In The Supreme Court of the United States

ROSIE DIGGLES, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

---

in forma pauperis

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QUESTION PRESENTED

Is the Court required to orally pronounce special conditions and give reasons for those special condition, as a condition of mandatory supervision, at sentencing, or is it sufficient to reference to an external document, for a list of special conditions that may or will be imposed at sentencing. Even when the external documents provides no reasoning for the imposition?

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Don Bailey, on behalf of Rosie Diggles, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 3) is reported at *United States v. Diggles,* 975 F.3d 551 (5th Cir. 2020)(en banc). The Panel Opinion by the Fifth Circuit (App. 4), is found at *United States v. Diggles,* 928 F.3d 380 (5th Cir. 2019). The United States District Court for the Eastern District of Texas entered a Judgment, sentencing Mrs. Diggles to 54

months. *United States v. Diggles*, 2018 WL 3715199, 9:15cr24(3) (EDTX May 29, 2018) (Pet. App. 2).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2020.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1). The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This appeal is submitted pursuant to Supreme Court rule 10(a) in that the underlying decision by the Fifth Circuit sanctioned a departure of normal judicial process by a lower court to such an extent as to call for this Court's supervisory powers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(c) and 18 U.S.C. 3583(d)(Pet. App. 1)

STATEMENT OF THE CASE

Rosie Diggles was indicted in the Eastern District of Texas for conspiracy to commit wire fraud, wire fraud and money laundering. The allegations were that her husband, Walter, daughter, Anita, and her all participated in a scheme to divert federal funds directed at the Deep East Texas Council of Governments, ("DETCOG"). The funding was for hurricane relief due to Hurricanes Katrina and

[1] In accordance with emergency COVID rules of the Supreme Court, this petition is submitted within the 150 days allowed.

Rita from 2007 to 2012. A Jury convicted Rosie Diggles and the Court subsequently sentenced her to 54 months in prison.

At sentencing, the Court did not recite special conditions, as required in *United States v. Rivas-Estrada,* 906 F.3d 346, 350 (5th Cir. 2018). In this regard, the Court stated that the Rosie Diggles "must comply with the mandatory and special conditions and instructions set out in the Defendants' presentence report. Now, that is found at your PSI---revised PSI, Docket Number 151, pages 27 and 28." (ROA.3911) The Court did not announce what the mandatory and special conditions would be.

The Court entered judgment on May 29, 2018. (ROA.597-604) Within the judgment were the special conditions of supervision. These included; 1) you must pay any financial penalty that is imposed by the judgment, 2) you must provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and employment, 3) you must not incur new credit card charges or open additional lines of credit without the approval of the probation officer unless payment of any financial obligation ordered by the Court has been paid in full, and 4) you must not participate in any form of gambling unless payment of any financial obligation ordered by the Court has been paid in full. (ROA.602) There is nothing in the record to indicate the Court ever made

Rosie Diggs aware of these special conditions, other than a reference to an external document.

REASONS FOR GRANTING THE PETITION

The requirement that a judge orally state a sentence is a product of the defendant's constitutional right to be present at sentencing. *United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001). To preserve that right, the oral pronouncement controls over a conflicting written judgment. *United States v. Mudd*, 685 F.3d 473, 480 (5th Cir. 2012). A true conflict is not required; including an unpronounced aspect of the sentence in the written judgment may "broaden" the oral sentence and thus "conflict" with it. *United States v. Rivas-Estrada*, 906 F.3d 346, 350 (5th Cir. 2018). A district court abuses its discretion in telling the defendant only that the conditions listed in the PSR would be imposed. *Id.* at 350–51.

The subsequent decisions of the Fifth and Fourth Circuits conflict with the fundamental requirement that special conditions related to sentences should be orally pronounced and justified, and references to external documents do not give a defendant a fair opportunity to object to these special conditions. *See United States v. Diggles*, 928 F.3d 380 (5th Cir. 2019)(*aff'd in part, rev'd in part, and remanded); United States v. Diggles*, 975 F.3d 551 (5th Cir. 2020)(*en banc); United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020)

In the case of Rosie Diggles, the Fifth Circuit has concluded, after three attempts at resolution, that special conditions of supervised release can simply be placed in a pre-sentence report, without justification or reasoning, and as long as the District Court makes reference to the pre-sentence report, as listing those special conditions, it satisfies the Constitution and the statutory requirements of 18 U.S.C. § 3583. *See United States v. Rivas-Estrada,* 906 F.3d 346, 350 (5th Cir. 2018)(District Court must verbally announce special conditions at sentencing); *See United States v. Rosie Diggles,* 928 F.3d 380 (5th Cir. 2019)(District Court erred in not verbally announcing some special conditions at sentencing); *United States v. Rosie Diggles, et al,* 975 F.3d 551 (5th Cir. 2020)(en banc)(a simple referral to the pre-sentence report, which listed special conditions without any reasoning or justification was adequate to fulfill the requirements of the Constitution and 18 U.S.C. § 3583.

Since the *en banc Diggles* decision, the Fourth Circuit has taken it one step further and relied upon the *en banc Diggles* opinion for support. In *United States v. Rogers,* 961 F.3d 291 (4th Cir. 2020), the Fourth Circuit stated that should the Court have a standing order on special conditions, then simply referring by reference to that standing order would be sufficient to impose whatever special conditions were found in that standing order. *Id*, 961 F.3d 299. Even with this stretch, the Fourth Circuit recognized that "the 'better practice' will be to announce

each discretionary condition 'in open court with [the defendant] present.'" *Id,* at 299; *citing United States v. Wroblewski,* 781 F. App. 158, 161 n.1 (4th Cir. July 12, 2019)

Thus, the slippery slope about what is acceptable at sentencing has begun. District Courts will soon be able to refer to the pre-sentence report, or some standing order, as a basis of the conditions and parameters of what a defendant may receive at sentencing, without explaining why that condition or parameter is applicable by the Court. Thus, the Probation Officer, as is already well underway, will be the central figure in sentencing persons convicted in Federal Court in the United States.

Judge Posner has recognized what the problems with this slippery slope might be in relying on the work of Probation Officers in *United States v. Siegel,* 753 F.3d 705 (7th Cir. 2014). Judge Posner outlined the problem as:

> By default, most judges, in deciding what conditions of supervised release to impose, rely heavily on the recommendations of the federal probation service (formally, the "U.S. Probation and Pretrial Services System"), a unit of the Administrative Office of the U.S. Courts. (For a comprehensive summary of the duties and functions of the probation service, prominently including supervised release, see U.S. Courts, *Guide to Judiciary Policy,* vol. 8: *Probation and Pretrial Services,* part E: "Supervision of Federal Offenders" (2010).)
>
> A probation officer prepares the presentence report that advises the judge on the sentence to give the defendant who has been found guilty. The report (or sometimes a later supplement to it) will, under the heading "Sentencing Recommendation," suggest conditions of supervised release, with usually a brief reason for each one. The brevity of the reasons given may reflect the fact that the probation service, though responsible and knowledgeable, is

understaffed. The number of persons under supervision either pre- or post-trial is approaching 200,000. See Matthew G. Rowland, "Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons," *Federal Probation*, vol. 77, no. 2, Sept. 2013, www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2013–09/too-many.html. Yet there are only about 5,400 probation officers. Dividing the number of persons under supervision by the number of officers yields a ratio of 36 such persons to each officer, which seems too many for effective supervision, especially when we consider that 90,000 federal criminal defendants were sentenced in the year ending on September 30, 2010 (we haven't found more recent statistics), so that the probation service had to write 90,000 presentence reports in addition to performing its other duties. There is some evidence that reducing caseloads can reduce recidivism, at least if the intensity of supervision is not reduced, without increasing the number of revocations of release that are based on technical violations of conditions of release. Sarah Kuck Jalbert et al., "Testing Probation Outcomes in an Evidence–Based Practice Setting: Reduced Caseload Size and Intensive Supervision Effectiveness," 49 *J. Offender Rehabilitation* 233 (2010).

Judges are limited in their ability to look behind the recommendations of the probation officers. The academic studies of recidivism are unfamiliar to most judges and often difficult for a judge who lacks a social-scientific background to evaluate. And it is doubtful that even experienced judges, who have sentenced a great many criminals, acquire from that experience a sophisticated understanding of the likely behavior of convicted criminals upon their release from prison and how that behavior can be altered by imposing post-release restrictions before, often long before, a prisoner's release.

So it is both inevitable and proper that judges give weight to the probation service's recommendations regarding what conditions of supervised release to impose. But how much weight? Normally the recommendations in the report are those of a single probation officer, and the scientific basis (if there is a scientific basis) of his recommendation is not disclosed in his presentence report. Probation officers receive only limited training in the duties of their job (consisting primarily of six weeks at the Federal Probation and Pretrial Services Training Academy, though there is follow on training as well). See U.S. Courts, "Probation and Pretrial Services: Officers and Officer Assistants," www.uscourts.gov/federalcourts/probationpretrialservices/officers.aspx.

Id, 735 F.3d 705, 710-711. What Judge Posner recognizes is that Probation Officers have increasingly become the tail that wags the dog. District Judges are increasingly relying upon what is in a Report and Recommendation without looking behind the curtain. In the case of Rosie Diggles, there were special conditions named that did not have any reasoning provided, either by the Court or the Probation Officer. This fundamentally violates the requirements of the Constitution and 18 U.S.C. § 3583(d) for an individualized sentencing and the statement for the sentence required by 18 U.S.C. § 3553(c).

Judge Posner went further in stating what is not always obvious at sentencing as to why Judges rely on the Probation Officer and do not focus on the requirements of the statute regarding special conditions;

> One reason for this judicial insouciance is that the sentencing hearing may be the first occasion on which defense counsel learns of the probation service's recommendation for conditions of supervised release. With no advance notice, counsel may have nothing to say about the conditions; nor is he likely to be prodded by his client, because the remoteness of the future time at which the conditions will take effect may very well make them a matter of indifference to the defendant. Criminals who court long prison sentences tend to have what economists call a "high discount rate." That is, they give little weight to future costs and benefits. That is why they are not deterred by the threat of a long prison sentence, since the added cost of the added length of the sentence will not be experienced for many years. Defendants are more likely to be concerned with whether they can self-surrender at a later date to begin serving their prison term rather than being taken directly from the sentencing hearing to prison, and what prison they will be assigned to—determinations that will affect their immediate welfare—than with restrictions that will not take effect for many years. With therefore no adversary challenge to the conditions of supervised release, the

> judge, being habituated to adversary procedure, is unlikely to question the conditions recommended by the probation service.

Id. At 711.

As noted as a "better practice" by the Fourth Circuit, Judges should reflect on special conditions, announce those special conditions at sentencing, and give reasoning for why those special conditions are being imposed. To allow less, turns the sentencing process into an assembly line where the Judge is just one stop on the way to what becomes an inherently faulty sentence.

CONCLUSION

The Fifth Circuit's determination on the issue of oral pronouncement of special conditions and the lack of reasoning for special conditions is error.[2]The action should be remanded so that the special conditions can be struck from the judgment.

Respectfully Submitted;

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[2] In the Fifth Circuit's sua sponte order granting of en banc review, the questions presented by the Court also concerned the requirements of 18 U.S.C. § 3553(c). However, this was not a focus of their subsequent reasoning.

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APPENDIX

1. Statutes, 18 U.S.C. § 3553(c) and 18 U.S.C. § 3583(d)

2. *United States v. Rosie Diggles, et al,* 2018 WL 3715199, 9:15cr24 (E.D.Tx. 2018)

3. *United States v. Rosie Diggles, et al*, 975 F.3d 551 (5th Cir. 2020)(en banc)

4. *United States v. Rosie Diggles*, 928 F.3d 380 (5th Cir. 2019)

Statutes

18 U.S.C. § 3553(c)

STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence…

18 U.S.C. § 3583(d)

CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be

of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1)

is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2)

involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3)

is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

District Court Judgment

2018 WL 3715199 (E.D.Tex.) (Trial Order)
United States District Court, E.D. Texas.
Lufkin Division

UNITED STATES OF AMERICA,

v.

Rosie DIGGLES.

No. 9:15-CR-00024-RC-ZJH.
May 29, 2018.

***1** USM Number: 25053-078

Judgment in a Criminal Case

Bobby D. Mims Defendant's Attorney.

Ron Clark, Judge.

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.

☐ pleaded nolo contendere to count(s) which was accepted by the court

was found guilty on count(s) after a plea of not guilty **1, 13-22 and 28 of the Indictment**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:1349 & 1343 Conspiracy To Commit Wire Fraud	7/31/2012	1
18:1343 Wire Fraud	12/3/2010	13
18:1343 Wire Fraud	12/24/2010	14
18:1343 Wire Fraud	1/3/2011	15
18:1343 Wire Fraud	4/26/2011	16

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 22, 2018

Date of Imposition of Judgment

<<signature>>

Signature of Judge

RON CLARK UNITED STATES DISTRICT JUDGE

Name and Title of Judge

5/29/2018

Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section / Nature of Offense	Offense Ended	Count
18:1343 Wire Fraud	6/13/2011	17
18:1343 Wire Fraud	8/24/2011	18
18:1343 Wire Fraud	8/29/2011	19
18:1343 Wire Fraud	12/1/2011	20
18:1343 Wire Fraud	2/24/2012	21
18:1343 Wire Fraud	11/27/2012	22
18:1957(a) and (b)(1) Engaging In Monetary Transactions In Property Derived From Specified Unlawful Activity	9/6/2011	28

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

54 months as to counts 1, 13-22 and 28, all to run concurrently.
The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be placed in a federal facility in Houston, Texas, to facilitate family visitation, if eligible.

While incarcerated, it is recommended that the defendant participate in the Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the requirements of the Inmate Financial Responsibility Program.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on July 10, 2018

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

***2** Defendant delivered on _____ to at _____, with a certified copy of this judgment.
UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:**three (3) years as to each of Counts 1, 13-22, and 28, all to run concurrently**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. # You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. # You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

***3** 6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txep.uscourts.gov.

Defendant's Signature _____
Date _____

SPECIAL CONDITIONS OF SUPERVISION

You must pay any financial penalty that is imposed by the judgment.

You must provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and employment.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless payment of any financial obligation ordered by the Court has been paid in full.

You must not participate in any form of gambling unless payment of any financial obligation ordered by the Court has been paid in full.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	*4 Assessment	JVTA Assessment[a1]	Fine	Restitution
TOTALS	$1,200.00		$.00	$971,143.57

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution of $971,143.57, jointly and severally with co-defendant Anita Diggles (9:15-cr-00024-2) and Walter Diggles (9:15-cr-00024-1), to:
US DEPT OF HEALTH AND HUMAN SERVICES

☐ Restitution amount ordered pursuant to plea agreement

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:
A # Lump sum payments of $ 1200.00 due immediately, balance due

☐ not later than, or

in accordance ☐ C, ☐ D, ☐ E, or # F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days)* after the date of this judgment; or

☐ Payment in equal 20 (*e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F # Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment total of $1,200.00 for Counts 1, 13-22 and 28, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. It is further ordered that the defendant is jointly and severally liable with Walter Diggles, Docket No. 9:16CR00024-001, and Anita Diggles, Docket No. 9:15CR00024-002, to pay restitution totaling $971,143.57 to the victim listed in the "Restitution" section of the Presentence Report, which is due and payable immediately. Any restitution amount that remains unpaid when your supervision commences is to be paid on a monthly basis at a rate of at least 10% of your gross income, to be changed during supervision, if needed, based on your changed circumstances, pursuant to 18 U.S.C. § 3664(k). If you receive an inheritance, any settlements (including divorce settlement and personal injury settlement), gifts, tax refunds, bonuses, lawsuit awards, and any other receipt of money (to include, but not limited to, gambling proceeds, lottery winnings, and money found or discovered) you must, within 5 days of receipt, apply 100% of the value of such resources to any restitution still owed.

***5** Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to: the Clerk, U.S. District Court. Fine & Restitution, 211 West Ferguson Street Rm 106, Tyler, TX 75701.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.
Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on her restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Footnotes

a1 Justice for Victims of Trafficking Act od 2015, Pub. L. No. 114-22

Fifth Circuit En Banc

957 F.3d 551
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Rosie DIGGLES; Walter Diggles; Anita Diggles, Defendants - Appellants

No. 18-40521
|
FILED April 29, 2020

Synopsis

Background: Three defendants were convicted in the United States District Court for the Eastern District of Texas, Ron Clark, J., 2018 WL 3715194, 2018 WL 3715198, and 2018 WL 3715199, of conspiracy to commit wire fraud, wire fraud, theft from a program receiving federal funds, and money laundering, arising from use of federal disaster assistance funds for personal use. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, 928 F.3d 380, affirmed in part, vacated in part, and remanded.

Holdings: On rehearing en banc, the Court of Appeals, Costa, Circuit Judge, held that:

[1] if a supervised release condition is mandatory, the court need not orally pronounce it at sentencing;

[2] if a supervised release condition is discretionary, the court must orally pronounce it at sentencing;

[3] plain error standard of review applied to defendants' appellate challenge to the adequacy of the sentencing court's pronouncement of the conditions of supervised release; and

[4] oral in-court adoption of proposed supervised release conditions in presentence investigation report complied with oral pronouncement requirement.

Affirmed.

West Headnotes (20)

[1] **Sentencing and Punishment** Use and effect of report

Sentencing and Punishment Imposition of Conditions and Obligations

Conditions of supervised release cannot be incorporated by reference into a sentence when they are listed only in a recommendation for the presentence investigation report that has not been disclosed to the defendant.

[2] **Sentencing and Punishment** Presence of Defendant

Sentencing and Punishment Execution of Sentence

The district court must orally pronounce a sentence to respect the defendant's right to be present for sentencing. Fed. R. Crim. P. 43(a)(3).

[3] **Sentencing and Punishment** Oral and written pronouncements

If the in-court sentencing pronouncement differs from the written sentencing judgment that later issues, what the judge said at sentencing controls.

3 Cases that cite this headnote

[4] **Sentencing and Punishment** Announcement of and advice as to conditions

The requirement that a sentence must be orally pronounced applies to some supervised release conditions, but not all of them. Fed. R. Crim. P. 43(a)(3).

4 Cases that cite this headnote

[5] **Sentencing and Punishment** Announcement of and advice as to conditions

When the Sentencing Guidelines recommend a condition of supervised release, rather

than merely note that the condition may be appropriate, the condition may be a standard condition that is not required to be pronounced orally at sentencing. U.S.S.G. § 5D1.3(a), (c).

2 Cases that cite this headnote

[6] **Sentencing and Punishment** Other particular issues

Including a sentence in the written judgment that the district judge never mentioned when the defendant was in the courtroom for sentencing is tantamount to sentencing the defendant in absentia.

[7] **Constitutional Law** Presence and Appearance of Defendant and Counsel

Constitutional Law Presence and appearance of defendant and counsel

Criminal Law Proceedings in absence of accused

Unlike the right to be present at trial which stems from the Sixth Amendment's Confrontation Clause, the right to be present at proceedings that lack testimony, such as sentencing hearings, comes from the Fifth Amendment's Due Process Clause. U.S. Const. Amend. 5, 6; Fed. R. Crim. P. 43(a)(3).

[8] **Constitutional Law** Presence and Appearance of Defendant and Counsel

The presence of a defendant at a proceeding is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. U.S. Const. Amend. 5.

[9] **Constitutional Law** Presence and Appearance of Defendant and Counsel

A defendant's due process right to be present turns on whether a defendant's presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against a criminal charge. U.S. Const. Amend. 5.

[10] **Constitutional Law** Presence and appearance of defendant and counsel

The sentencing hearing is a critical stage of a criminal case, so that the defendant has a due process right to be present at sentencing. U.S. Const. Amend. 5; Fed. R. Crim. P. 43(a)(3).

[11] **Sentencing and Punishment** Announcement of and advice as to conditions

If a condition of supervised release is required by the supervised release statute, making an objection futile, the court need not orally pronounce it at sentencing. 18 U.S.C.A. § 3583(d); Fed. R. Crim. P. 43(a)(3).

4 Cases that cite this headnote

[12] **Sentencing and Punishment** Announcement of and advice as to conditions

If a condition of supervised release is discretionary, under the supervised release statute, the court must orally pronounce it at sentencing to allow for an objection. 18 U.S.C.A. § 3583(d); Fed. R. Crim. P. 43(a)(3).

4 Cases that cite this headnote

[13] **Criminal Law** Necessity of Objections in General

When a defendant objects for the first time on appeal, the appellate court usually reviews only for plain error. Fed. R. Crim. P. 52(b).

[14] **Criminal Law** Necessity of Objections in General

The plain error standard of review is difficult to overcome; it requires a defendant to show an obvious error that impacted his substantial rights and seriously affected the fairness, integrity, or reputation of judicial proceedings. Fed. R. Crim. P. 52(b).

1 Cases that cite this headnote

[15] **Criminal Law** Necessity of Objections in General

The appellate court will not review for plain error when the defendant did not object in the trial court because he did not have an opportunity to object in the trial court. Fed. R. Crim. P. 51(b).

1 Cases that cite this headnote

[16] **Criminal Law** Probation and related dispositions

Plain error standard of review applied to defendants' arguments on appeal challenging the adequacy of the sentencing court's pronouncement of the conditions of supervised release, where the sentencing court announced at sentencing that it was adopting the proposed supervised release conditions in the presentence investigation reports, but did not orally recite those conditions, and the defendants failed to object. 18 U.S.C.A. § 3583(d); Fed. R. Crim. P. 52(b).

5 Cases that cite this headnote

[17] **Sentencing and Punishment** Sufficiency

The defendant's right to oral pronouncement of a sentence is satisfied when a district judge enables a defendant's ability to mount a defense by giving the defendant notice of the sentence and an opportunity to object.

[18] **Constitutional Law** Supervised release

Sentencing and Punishment Use and effect of report

Sentencing and Punishment Other particular issues

Sentencing and Punishment Announcement of and advice as to conditions

Sentencing court's oral in-court adoption of a written list of proposed supervised release conditions set forth in the presentence investigation report, judge-specific standing order, or other written document, without explicitly reciting the conditions word-for-word, complied with the defendant's due process right to be present at sentencing, when the defendant confirmed that he had opportunity to review the presentence investigation report or other document containing the conditions with counsel. U.S. Const. Amend. 5; 18 U.S.C.A. § 3583(d); Fed. R. Crim. P. 32(e)(2), 43(a)(3).

[19] **Sentencing and Punishment** Use and effect of report

Sentencing and Punishment Objections and disposition thereof

Even when the defendant disputes a sentencing enhancement, the sentencing court may justify overruling the objection by orally adopting unrebutted factual findings in the presentence investigation report; there is no need to spell out those facts. Fed. R. Crim. P. 32(i)(3).

[20] **Sentencing and Punishment** Use and effect of report

Sentencing and Punishment Announcement of and advice as to conditions

A sentencing court's general oral in-court adoption of a presentence investigation report recommending supervised release supports the inference that it considered the relevant considerations in imposing supervised release.

***553** Appeals from the United States District Court for the Eastern District of Texas, Ron Clark, U.S. District Judge

Attorneys and Law Firms

Bradley Elliot Visosky, Thomas Edward Gibson, Assistant U.S. Attorneys, Stephan Edward Oestreicher, Jr., U.S. Attorney's Office, Eastern District of Texas, Plano, TX, for Plaintiff-Appellee.

Donald Lee Bailey, Sherman, TX, for Defendant-Appellant Rosie Diggles.

Seth Kretzer, Law Offices of Seth Kretzer, Houston, TX, for Defendant-Appellant Walter Diggles.

Kevin Blake Ross, Law Office of Kevin B. Ross, P.C., Dallas, TX, for Defendant-Appellant Anita Diggles.

Before OWEN, Chief Judge, and HIGGINBOTHAM, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

Opinion

GREGG COSTA, Circuit Judge:

***554** District courts in the Fifth Circuit sentence more than 15,000 defendants a year. U.S. Sentencing Comm'n, Statistical Information Packet: Fifth Circuit, Fiscal Year 2018, at 3 tbl.1 (17,658 sentenced); 2017, at 2 tbl.1 (16,712 sentenced); 2016, at 2 tbl.1 (16,074 sentenced); 2015, at 2 tbl.1 (16,344 sentenced). About 90% of those defendants are sentenced to prison. *Id*. Fiscal Year 2018, at 9 tbl.5 (noting that 91.9% of defendants received some prison term as part of their sentence). And most defendants sentenced to prison will be on supervised release when they get out. U.S. Sentencing Comm'n, Overview of Federal Criminal Cases, Fiscal Year 2018, at 10 (74.7% of all defendants serving time and 84.3% of nonimmigration defendants); 2017, at 6 (83.8% of all defendants serving time and 94.1% of nonimmigration defendants).

Supervised release "assist[s] individuals in their transition to community life." *United States v. Johnson*, 529 U.S. 53, 59, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000). To promote that reintegration and protect the public from further crimes, courts often impose conditions on a releasee. *See Mont v. United States*, —— U.S. ——, 139 S. Ct. 1826, 1833, 1835, 204 L.Ed.2d 94 (2019). Examples include drug testing, mental health treatment, job training, community service, and sex offender registration. *See id*. at 1835. Although the goal of such conditions is to help the releasee lead a productive and crime-free life, failure to comply can result in a return to a prison. Consequently, these important features of the federal criminal justice system are often the subject of appeals.

We heard this case en banc to resolve inconsistency in our caselaw on one common issue: How does the requirement that a court pronounce its sentence in the presence of the defendant apply to supervision conditions?

I.

A jury convicted Rosie, Walter, and Anita Diggles of fraud in connection with the receipt of hurricane-relief funds. They assert that the evidence did not support their convictions. Adopting the original panel's opinion on the sufficiency challenges, we disagree and affirm the convictions. *United States v. Diggles*, 928 F.3d 380, 387–91 (5th Cir. 2019).

Rosie Diggles also challenges her 54-month prison sentence, arguing that the district court should not have applied a Sentencing Guidelines enhancement for making a misrepresentation "on behalf of a charitable, educational, religious, or political organization, or a government agency." U.S.S.G. § 2B1.1(b)(9)(A). We again agree with the panel opinion and affirm her custodial sentence. 928 F.3d at 391–92.

II.

That brings us to the reason for full-court review. The district court required supervised release for each defendant and ordered Walter to pay $1.33 million in restitution, with Rosie and Anita jointly and severally liable for just over $970,000. The judgments include four conditions of ***555** supervised release related to the defendants' financial obligations. They require the defendants to:

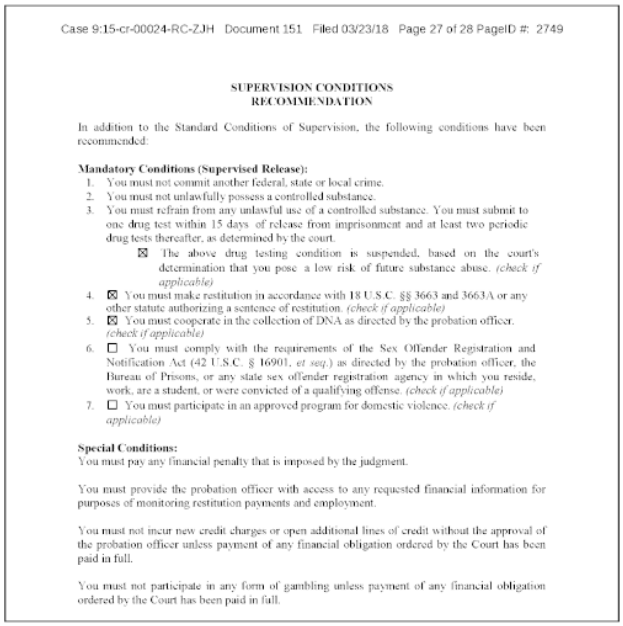
1. "pay any financial penalty that is imposed by the judgment";
2. "provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and employment";
3. "not incur new credit charges or open additional lines of credit without the approval of the probation officer" until full payment is made; and
4. "not participate in any form of gambling" until full payment is made.

The defendants object that the district court did not recite those conditions when imposing their sentences. Instead, taking Walter's sentencing as an example, the judge said:

> In addition, defendant must comply with the mandatory and special conditions and instructions set out in the revised presentence report.
>
> Looking at the Revised Presentence Investigation Report, those conditions are found at this Document 149 at page 27 and 28. Now, the title there is "Supervision Conditions Recommendation." Those are no longer just a recommendation; those are the conditions and special instructions that I have adopted.

[1] Here is the part of the Presentence Investigation Report (PSR) that the court adopted[1]:

***556**



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SUPERVISION CONDITIONS RECOMMENDATION

In addition to the Standard Conditions of Supervision, the following conditions have been recommended:

Mandatory Conditions (Supervised Release):

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

Special Conditions:

You must pay any financial penalty that is imposed by the judgment.

You must provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and employment.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless payment of any financial obligation ordered by the Court has been paid in full.

You must not participate in any form of gambling unless payment of any financial obligation ordered by the Court has been paid in full.

Despite the judge's express adoption of the PSR's recommendations, the defendants have some precedent to stand on in arguing it was not enough. We recently vacated supervised release conditions when the sentencing judge told the defendant that the conditions recommended in the PSR would be imposed instead of reciting them one-by-one. *United States v. Rivas-Estrada*, 906 F.3d 346, 350–51 (5th Cir. 2018). Other caselaw gives district judges more leeway in adopting written recommendations. For instance, we upheld conditions when, during sentencing, the court admitted a Probation Office memo recommending conditions without discussing them further. *United States v. Rouland*, 726 F.3d 728, 734 (5th Cir. 2013) (applying plain-error review because the exhibit provided notice); *see also United States v. Al Haj*, 731 F. App'x 377, 379 (5th Cir. 2018) (per curiam) (finding no error when the defendant signed a document listing conditions). We agreed to hear this case en banc to reconcile our caselaw, which creates a granular distinction at best and a backwards one at worst. After all, a PSR's list of proposed conditions provides much earlier notice than an exhibit given to the parties for the first time at sentencing. *See Diggles*, 928 F.3d at 393.

A.

[2] **[3]** **[4]** The district court must orally pronounce a sentence to respect the defendant's right to be present for sentencing. *See* ***557** *United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001) (per curiam); *see also* Fed. R. Crim. P. 43(a)(3). If the in-court pronouncement differs from the judgment that later issues, what the judge said at sentencing controls. *United States v. Kindrick*, 576 F.2d 675, 676–77, 677 n.1 (5th Cir. 1978) (collecting cases). This pronouncement rule applies to some supervised release conditions, but not all of them. *See United States v. Torres-Aguilar*, 352 F.3d 934, 936–38 (5th Cir. 2003) (per curiam); *Martinez*, 250 F.3d at 942. So before deciding whether adoption of written recommended conditions counts as pronouncement, we address when pronouncement is required.

Here too our law is confusing. Pronouncement is not required for what the Sentencing Guidelines call "mandatory" and "standard" conditions. *See* U.S.S.G. § 5D1.3(a), (c); *Torres-Aguilar*, 352 F.3d at 938. It is, however, required for "discretionary" and "special" conditions. U.S.S.G. § 5D1.3(b), (d); *United States v. Vega*, 332 F.3d 849, 853 n.8 (5th Cir. 2003) (per curiam); *Martinez*, 250 F.3d at 942.

[5] But these lines are not so clear cut. Sometimes a condition labeled "special" is not special after all; it may essentially be a standard condition that need not be pronounced. *See Rouland*, 726 F.3d at 735 ("[S]pecial conditions may be tantamount to standard conditions under the appropriate circumstances, thereby precluding the need for an oral pronouncement."); *Torres-Aguilar*, 352 F.3d at 937 (explaining that it is "irrelevant" that the Guidelines label a condition "special" (quoting *United States v. Asuncion-Pimental*, 290 F.3d 91, 94 (2d Cir. 2002))). When is a condition "special" in name only? When the Guidelines recommend the condition, rather than merely note that the

condition may be appropriate. *Torres-Aguilar*, 352 F.3d at 937–38 (concluding that pronouncement is not required for special conditions that the Guidelines recommend). Adding to this confusion is that we have sometimes said that conditions the Guidelines label as "special," but that are recommended and thus effectively standard, may become special again when the judgment labels them as such (as the judgments here do for the challenged conditions). *See United States v. Ramos*, 765 F. App'x 70, 71–72 (5th Cir. 2019) (per curiam). Follow that?

We can do better. A return to first principles paves the way.

[6] We begin with the source of the pronouncement requirement. It is part of a defendant's right to be present for sentencing.[2] *Vega*, 332 F.3d at 852; *Martinez*, 250 F.3d at 942. Including a sentence in the written judgment that the judge never mentioned when the defendant was in the courtroom is "tantamount to sentencing the defendant *in absentia*." *United States v. Weathers*, 631 F.3d 560, 562 (D.C. Cir. 2011).

[7] **[8]** **[9]** **[10]** And where does the right to be present at sentencing come from? Unlike the right to be present at trial which stems from the Sixth Amendment's Confrontation Clause, the right to be present at proceedings that lack testimony (usually true of sentencings) comes from the Fifth Amendment's Due Process Clause. *See United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). As is typically true of due ***558** process rights, this one does not set out bright lines. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts,* 291 U.S. 97, 107–08, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Put differently, the right turns on whether a defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* at 105–06, 54 S.Ct. 330. The sentencing hearing is a critical stage of a criminal case—usually *the* critical stage these days when well over 95% of federal defendants plead guilty—so we have recognized a constitutional right to be present at sentencing. *United States v. Huff*, 512 F.2d 66, 71 (5th Cir. 1975). This right is reflected in Federal Rule of Criminal Procedure 43(a)(3).

The scope of the pronouncement requirement should correspond to the standard governing the presence right from which it flows. So when is pronouncement of a supervised release condition necessary to give the defendant a sufficient "opportunity to defend"? *Snyder*, 291 U.S. at 105, 54 S.Ct. 330. Certainly when imposition of that condition is discretionary, because then the defendant can dispute whether it is necessary or what form it should take. But when a condition is mandatory, there is little a defendant can do to defend against it. The basic distinction underlying our pronouncement caselaw was thus sound, though it became muddled by focusing on the labels used in the Sentencing Guidelines and written judgments.

That confusion can be eliminated, or least minimized, by tethering the need to pronounce to the statute that regulates supervised release conditions: 18 U.S.C. § 3583(d), which distinguishes between required and discretionary conditions. Section 3583(d) first lists conditions the court "shall" impose (some for all offenses, others for certain offenses). Examples include not committing a crime or unlawfully possessing a controlled substance, cooperating in the collection of a DNA sample, paying any restitution, and registering as a sex offender for offenses that require it. *Id*. The statute then says that a court "may" impose other conditions that are "reasonably related" to certain statutory sentencing factors, "involve[ ] no greater deprivation of liberty than is reasonably necessary" to accomplish certain sentencing objectives, and are consistent with the Sentencing Guidelines. *Id*. It also cross-references the statute that lists discretionary conditions of probation. *Id*. (citing 18 U.S.C. § 3563(b)). Having the pronouncement requirement depend on whether a condition is discretionary under section 3583(d) is a bright-line rule that tracks the defendant's right to be present at sentencing.[3]

Tying the pronouncement requirement to section 3583(d)'s dividing line produces another benefit: it will mirror the statutory requirement for when a court must justify the conditions it imposes (what courts call the "articulation" requirement). As just mentioned, discretionary conditions must be tailored to statutory considerations. 18 U.S.C. § 3583(d); *see United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014) (discussing the need to make findings for these discretionary conditions). It makes sense for the articulation and pronouncement requirements to share the same trigger.

***559** **[11]** **[12]** We therefore reject the byzantine distinctions we have drawn between standard, mandatory, standard-but-listed-in-the-judgment-as-special, "true" special, and not-really-special conditions when it comes to pronouncement.[4] From now on, what matters is whether a condition is required or discretionary under the supervised release statute. *See* 18 U.S.C. § 3583(d). If a condition is required, making an objection futile, the court

need not pronounce it. If a condition is discretionary, the court must pronounce it to allow for an objection.

Looking at these defendants' conditions in terms of section 3583, the first one requiring them to pay financial penalties —here, restitution—was required. 18 U.S.C. § 3583(d) ("The court shall order, as an explicit condition of supervised release, ... that the defendant make restitution ...."). The court thus did not need to mention it at sentencing. But the other three—allowing access to financial information, limiting credit, and banning gambling—are not required under section 3583(d). Because those three conditions had to be pronounced, we will examine whether the sentencing judge satisfied that requirement when he adopted the PSR's recommended conditions.

B.

1.

[13] **[14]** We first address the standard of review. When a defendant objects for the first time on appeal, we usually review only for plain error. *See* Fed. R. Crim P. 52(b). This standard is "difficult" to overcome; it requires a defendant to show an obvious error that impacted his substantial rights and seriously affected the fairness, integrity, or reputation of judicial proceedings. *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

[15] But we do not review for plain error when the defendant did not have an opportunity to object in the trial court. *See* Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). That principle applies when a defendant appeals a court's failure to pronounce a condition that later appears in the judgment. *See, e.g.*, *United States v. Mudd*, 685 F.3d 473, 480 (5th Cir. 2012); *United States v. Bigelow*, 462 F.3d 378, 381 (5th Cir. 2006); *Torres-Aguilar*, 352 F.3d at 935. In our earlier cases that refused to find forfeiture of a pronouncement challenge, the district court had not made any mention of the condition at sentencing, nor was there any indication that the PSR proposed the challenged condition. *See Mudd*, 685 F.3d at 480; *Bigelow*, 462 F.3d at 380; *Torres-Aguilar*, 352 F.3d at 935. Our rejection of forfeiture in those cases was sensible because each defendant was blindsided when the condition showed up for the first time in the judgment. But we then forgave a defendant's failure to object even when the ***560** district court informed him what conditions would appear in the judgment by orally adopting conditions the PSR recommended. *See Rivas-Estrada*, 906 F.3d at 349–50.

[16] Our forfeiture caselaw in this area should be remoored to the opportunity to object. That opportunity exists when the court notifies the defendant at sentencing that conditions are being imposed. *See Rouland*, 726 F.3d at 733–34. The district court gave the defendants that notice by telling them it was adopting the PSR's proposed conditions. An objection at sentencing would have alerted the district court of a possible need to make a more detailed recitation of the discretionary conditions and justify them. *See Puckett*, 556 U.S. at 134, 129 S.Ct. 1423 (explaining that contemporaneous objections allow a district court to correct any errors as they arise); *see also Holguin-Hernandez v. United States*, —— U.S. ——, 140 S. Ct. 762, 764, 206 L.Ed.2d 95 (2020) ("A criminal defendant who wishes a court of appeals to consider a claim that a ruling of the trial court was in error must first make his objection known to the trial-court judge."). Plain-error review applies.

2.

The defendants do not clear even the first of the four plain-error hurdles for there was no error at all. We conclude that the district court pronounced the conditions for the same reason that plain-error review applies: the judge informed the defendants of the conditions, so they had an opportunity to object.

[17] The pronouncement requirement is not a meaningless formality. As discussed, it is part of the defendant's right to be present at sentencing, which in turn is based on the right to mount a defense. It is thus satisfied when a district judge enables that defense by giving the defendant notice of the sentence and an opportunity to object.

[18] Oral in-court adoption of a written list of proposed conditions provides the necessary notice. The PSR is the centerpiece of sentencing. *See* Fed. R. Crim. P. 32 (addressing primarily the presentence investigation and report when outlining the rules for sentencing). The Probation Office must produce it sufficiently in advance of sentencing to allow for the filing of written objections. Fed. R. Crim. P. 32(e)(2) (requiring disclosure 35 days before sentencing); *see also* 18 U.S.C. § 3552(d) (requiring disclosure at least 10 days before sentencing). And the first order of business at most sentencing

hearings is to verify that the defendant reviewed the PSR with counsel. Fed. R. Crim. P. 32(i)(1)(A). If he has not, the sentencing should not proceed. *See, e.g.*, *United States. v. Reyes*, 734 F. App'x 944, 945–46 (5th Cir. 2018) (per curiam) (describing a district court's halting a sentencing when it became unclear whether the defendant had understood the PSR). When the defendant confirms review of the PSR and sentencing goes forward, a court's oral adoption of PSR-recommended conditions gives the defendant an opportunity to object. *United States v. Bloch*, 825 F.3d 862, 872 (7th Cir. 2016) (rejecting a pronouncement challenge to this procedure because the key concern is whether the defendant had an opportunity to object at sentencing). Indeed, defendants who receive notice of proposed conditions in their PSRs have "far more opportunity to review and consider objections to those conditions" than defendants who hear about them for the first time when the judge announces ***561** them.[5] *Id.*

We also continue to approve the longstanding practice in some districts of a sentencing judge's oral adoption of courtwide or judge-specific standing orders that list conditions. *See Vega*, 332 F.3d at 853 (describing a general order of standard and mandatory conditions that the Southern District of Texas adopted in 1996).[6] A standing order provides advance notice of possible conditions just as a PSR recommendation does. And the in-court adoption of those conditions is when the defendant can object.

By permitting sentencing courts to orally adopt proposed conditions, we do not minimize the liberty constraints that supervision conditions impose or the important role they play in rehabilitation and protecting the public. To the contrary, we give full force to what the Seventh Circuit has recognized: providing written recommendations that a court then adopts affords earlier notice than when a defendant hears conditions for the first time when the judge announces them. *See United States v. Lewis*, 823 F.3d 1075, 1082 (7th Cir. 2016) (observing that "[t]here were no surprises in the sentencing hearing related to supervised release" when the PSR recommended the conditions that the court adopted). The adoption procedure also results in an enhanced opportunity to object—objections to proposed conditions can even be filed before sentencing—compared to when a lawyer must rely on memory and notes of what the judge just said in deciding whether an objection is warranted.[7] It is not surprising, then, that the defendants are unable to point to any problems with an adoption procedure for supervision conditions in the many district courts around the country that have used it. *See, e.g.*, *Bloch*, 825 F.3d at 872; *United States v. Espinoza*, 636 F. App'x 416, 418 (9th Cir. 2016) (per curiam); *United States v. Allison*, 531 F. App'x 904, 904–05 (10th Cir. 2013); *United States v. Sebastian*, 612 F.3d 47, 49 (1st Cir. 2010); *United States v. Lateef*, 300 F. App'x 117, 118 (2d Cir. 2008) (per curiam).[8]

***562** What is more, word-for-word recitation of each condition—just one can be lengthy[9]—during the emotionally charged sentencing hearing may result in a "robotic delivery" that has all the impact of the laundry list of warnings read during pharmaceutical ads. *United States v. Cabello*, 916 F.3d 543, 544–45 (5th Cir. 2019) (Higginbotham, J., concurring). And there is a cost, especially in our border districts where numerous defendants are often sentenced in a day, to prolonging sentencings with requirements that do not benefit the parties: less time for the sentencing court to devote to resolving disputed issues and deciding the critical questions of whether the defendant should go to prison and, if so, for how long. *See id*. (recognizing that prolonged hearings may lead to "perverse consequences in busy districts").

[19] **[20]** Speaking of the custody question that a sentencing judge usually decides before even addressing supervised release, it is worth considering our law allowing courts to adopt parts of the PSR for key aspects of that decision. We have long allowed district courts to adopt the PSR's findings when calculating the Sentencing Guidelines range. Courts routinely adopt the PSR's Guidelines calculations without having to recite each enhancement that makes up the offense level or each conviction that receives criminal history points. Fed. R. Crim. P. 32(i)(3)(A). Even when the defendant disputes an enhancement, the district court may justify overruling the objection by adopting unrebutted factual findings in the PSR; there is no need to spell out those facts.[10] *See, e.g.*, *United States v. Guzman-Reyes*, 853 F.3d 260, 266 (5th Cir. 2017) (following the longstanding practice of allowing a district court to adopt the factual findings in the PSR when overruling an objection). It would make little sense to prohibit incorporation-by-reference of the PSR for supervised release conditions when we allow it for the Guidelines calculation that influences the length of a defendant's prison term, the most momentous and usually most contested aspect of sentencing. *See United States v. Tulloch*, 380 F.3d 8, 13–14 (1st Cir. 2004) (per curiam) (observing that "incorporation by reference" is allowed for many aspects of sentencing when concluding that there is "no potential for abuse in allowing courts to streamline sentencing proceedings by incorporating by reference such well-known, commonly used conditions

of supervised release"). If oral adoption is good enough for the Guidelines calculation, then it should be good enough for supervision conditions.

While holding that oral adoption of written conditions is pronouncement of those conditions, we recognize that the practice may not satisfy other requirements. For example, we mentioned earlier the articulation ***563** requirement. Today's opinion does not undo any of our caselaw describing what satisfies that separate obligation. But any errors in articulation can be rectified on remand. *See Salazar*, 743 F.3d at 451. Our caselaw does not generally give the district court that second chance when it fails to pronounce a condition, even though conditions have salutary effects for defendants, victims, and the public.[11] *United States v. Mireles*, 471 F.3d 551, 558 (5th Cir. 2006) (explaining that a condition must be struck from the judgment when it is not pronounced); *United States v. Flores*, 664 F. App'x 395, 398 (5th Cir. 2016) (per curiam) (summarizing our law about when a discrepancy is a "conflict" that requires excising the condition from the judgment as opposed to an "ambiguity" that may allow the condition to remain).

The defendants do not assert that the district court failed to justify the conditions it imposed; they argue only that the court failed to recite those conditions at sentencing. Because the district court adopted the conditions the PSR proposed, it pronounced the three conditions it was required to: the financial disclosure requirement and the gambling and credit restrictions.

In reaching this holding, we have clarified the law governing supervised release conditions in three respects:

1. A sentencing court must pronounce conditions that are discretionary under 18 U.S.C. § 3583(d).

2. When a defendant fails to raise a pronouncement objection in the district court, review is for plain error if the defendant had notice of the conditions and an opportunity to object.

3. A sentencing court pronounces supervision conditions when it orally adopts a document recommending those conditions.

The thread running through each of these rulings is notice and an opportunity to object. Although the focus of this case was the adoption-of-the-PSR practice often used in the Eastern District of Texas, we do not mandate any particular procedure. As long as the sentencing judge notifies the defendant of the conditions being imposed and allows an opportunity to object, there will be no conflict with a judgment that lists those conditions.

* * *

The judgment is AFFIRMED.

All Citations

957 F.3d 551

Footnotes

1 This excerpt comes from the end of the revised PSR. Proposed supervision conditions often appear separately in the Probation Office's sentencing recommendation. District courts differ on whether they disclose that document to the parties. *See* Fed. R. Crim. P. 32(e)(3) (permitting a court to "direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence"). Of course, the adoption practice we discuss in this opinion works only if the defendant received the adopted document. So conditions cannot be incorporated by reference when they are listed only in a PSR recommendation that has not been disclosed to the defendant.

2 Some authority suggests that the pronouncement requirement also comes from the notion that only what the judge says in court is a judicial act, whereas the entry of judgment is a ministerial act. *See, e.g.*, *United States v. Marquez*, 506 F.2d 620, 622 (2d Cir. 1974); *Watkins v. Merry*, 106 F.2d 360, 361 (10th Cir. 1939). But that is not where we have rooted the right. And another court called this theory "more conclusory than analytical." *United States v. Weathers*, 631 F.3d 560, 562 (D.C. Cir. 2011).

3 In-court pronouncement of discretionary conditions does not just allow defendants an opportunity to opine on the propriety and scope of a condition. The requirement furthers a victim's right "to be reasonably heard" about what conditions would help protect them. 18 U.S.C. § 3771(a)(4); *see also* Fed. R. Crim. P. 32(i)(4)(B).

4 The Guidelines categories, *see* U.S.S.G. § 5D1.3, may retain significance in other contexts. There is no problem with sentencing courts' continuing to use that nomenclature. Indeed, they will need to in at least one way: the judgment form

district courts use separates conditions into "mandatory," "standard," and "special" categories. Admin. Office of the U.S. Courts, AO 245B, Judgment in a Criminal Case (2019).

We reject these labels only for deciding *when* pronouncement is required, replacing them with section 3583(d)'s binary required/discretionary distinction. But, as we will explain, to satisfy the pronouncement requirement when it exists, a district court may adopt "standard conditions" listed in a general court order.

5 A document proposing conditions that a court orally adopts at sentencing may take a form other than the PSR. Regardless of the type of document, the court must ensure, as it does with the PSR, that the defendant had an opportunity to review it with counsel. And the mere existence of such a document is not enough for pronouncement. The court must orally adopt the written recommendations when the defendant is in court. Accordingly, the *Rouland* procedure—in which the court admitted a list of proposed conditions but never said that it was adopting those recommendations, 726 F.3d at 730—does not count as pronouncement. Indeed, *Rouland* held only that the defendant failed to show the effect on his substantial rights that plain-error review requires; it did not bless the procedure. *Id.* at 734.

6 The Southern District of Texas's standing order mentioned in *Vega* adopts the mandatory and standard conditions listed in the Administrative Office of the U.S. Courts' judgment form. *See* S. Dist. of Tex., General Order No. H-1996-10, In the Matter of Conditions of Probation and Supervised Release (1996). That judgment form includes the thirteen standard conditions recommended by the Sentencing Guidelines. *Compare* AO 245B, *supra* note 4, *with* U.S.S.G. § 5D1.3(c).

The Southern District of Texas updated its standing order in 2017. S. Dist. of Tex., General Order No. H-2017-01, In the Matter of Conditions of Probation and Supervised Release (2017).

7 When a court adopts written recommendations, there are multiple opportunities to object. A defendant can object to the PSR in writing, can object when the court generally adopts the PSR, can object when handed a document listing the conditions at the hearing, and of course can object when the court adopts the conditions.

8 Although a number of these cases are unpublished, our usual reluctance to rely on nonprecedential authority is not implicated. We cite the cases to show what the district court did, not how the appellate court ruled.

9 The following condition for sex offenders shows how detailed conditions can be:

> The defendant shall not reside within 1,000 feet of the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, university or playground or a housing authority owned by a public housing authority or within 100 feet of a public or private youth center, public swimming pool or video arcade facility, without prior approval of the probation officer.

Rouland, 726 F.3d at 730.

10 Nor is a court always required to orally detail its reasons for imposing supervised release. A court's general "adoption of a PSR" supports the inference that it considered the relevant considerations in imposing supervised release. *United States v. Cancino-Trinidad*, 710 F.3d 601, 606 (5th Cir. 2013) (recognizing this principle and finding error only because the PSR that the court adopted contained an error).

11 The court asked about the rationale for this stark remedy at oral argument. Given our holding that there is no pronouncement error, this case does not afford us an opportunity to reconsider that rule.

Fifth Circuit Panel

928 F.3d 380
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Rosie DIGGLES; Walter Diggles; Anita Diggles, Defendants - Appellants

No. 18-40521
|
FILED June 26, 2019

Synopsis

Background: Three defendants were convicted in the United States District Court for the Eastern District of Texas, Ron Clark, J., of conspiracy to commit wire fraud, wire fraud, theft from a program receiving federal funds, and money laundering, arising from use of federal disaster assistance funds for personal use. Defendants appealed.

Holdings: The Court of Appeals, Gregg Costa, Circuit Judge, held that:

[1] sufficient evidence supported defendant's conviction for theft from program receiving federal funds;

[2] sufficient evidence supported defendant's conviction for money laundering;

[3] sufficient evidence supported defendant's conviction for conspiracy to commit wire fraud;

[4] Federal Sentencing Guidelines' two-level enhancement for offense involving misrepresentation that defendant was acting on behalf of charitable organization applied; and

[5] conflict between written judgment and oral pronouncement at sentencing required vacatur of special condition of release.

Affirmed in part; vacated in part and remanded.

West Headnotes (24)

[1] Criminal Law Construction of Evidence

Court of Appeals reviews the evidence in the light most favorable to the verdict.

[2] Criminal Law Reasonable doubt

Court of Appeals must affirm the verdict unless no rational jury could have found the defendants guilty beyond a reasonable doubt.

[3] Conspiracy Mail and wire fraud

Fact that wire fraud conspiracy defendant's foundation charged rates set by its vendor agreement with association that administered federal hurricane relief funds, which defendant was executive director of, did not preclude verdict finding defendant guilty of conspiracy to commit wire fraud arising from use of federal disaster assistance funds for personal use; defendant was on both sides of the agreement and controlled the agreed rates, making the scheme a more sophisticated one, not a lawful one.

[4] Telecommunications Effectiveness of communication to further fraud

To convict defendant of wire fraud, the wire need not contain a falsehood; it need only further the fraud scheme which itself must involve lies.

[5] Telecommunications Effectiveness of communication to further fraud

Email that defendant sent advanced fraud as required to support defendant's conviction for wire fraud, regardless of whether email itself contained misrepresentation, since the email put defendant's foundation one step closer to obtaining government funds, from association that administered federal hurricane relief funds, which defendant was executive director of,

for conference for defendant's foundation, and overall fraud scheme contained numerous misrepresentations related to costs, including the ultimate submission of fabricated paperwork to support requests related to the conference.

[6] **Telecommunications** Nature of scheme or device in general

Sufficient evidence supported defendant's conviction for wire fraud, including evidence that defendant transferred money, which his church obtained from association that administered federal hurricane relief funds, which defendant was executive director of, from church's main bank account to his personal credit card.

[7] **Larceny** Weight and Sufficiency

Sufficient evidence supported defendant's convictions for theft from a program receiving federal funds, including evidence that defendant's foundation held two conferences, defendant overbilled association that administered federal hurricane relief funds, which defendant was executive director of, for services performed at conferences, and when federal funds arrived at foundation, defendant deposited funds into account of church defendant operated, which defendant essentially used as personal account. 18 U.S.C.A. § 666(a)(1)(A).

[8] **Currency Regulation** Monetary transactions in unlawfully derived property

To support conviction for money laundering, government must prove that defendant engaged in financial transaction with property worth over $10,000, knowing that the property was derived from unlawful activity. 18 U.S.C.A. § 1957.

[9] **Currency Regulation** Monetary transactions in unlawfully derived property

Concealment of funds is not required to support conviction for money laundering. 18 U.S.C.A. § 1957.

[10] **Currency Regulation** Monetary transactions in unlawfully derived property

Sufficient evidence supported defendant's conviction for money laundering, including evidence that defendant used $39,000 of federal funds from association, which defendant was executive director of, to reimburse his own foundation for conference, which exceeded conference's expenses, that defendant fabricated conference's expenses by submitting fabricated sign-in sheet, that defendant knew of the fabrication underlying the reimbursement, and that defendant deposited the $39,000 from the foundation to his church's bank account, which he used as a personal account. 18 U.S.C.A. § 1957.

[11] **Conspiracy** Direct or Circumstantial Evidence

Direct evidence of an agreement to commit a crime is rare, so circumstantial evidence often proves a conspiracy.

[12] **Conspiracy** Mail and wire fraud

Sufficient evidence supported defendant's conviction for conspiracy to commit wire fraud, including evidence that defendant administered after-school and summer program for at-risk children, that she worked with her father, who was executive director of association that administered federal hurricane relief funds, to submit inflated reimbursement requests to the association, which her father signed off on, that defendant knew about the overbilling, and that she benefited from the fraud, using the proceeds to pay for her car and rent among other things.

[13] **Conspiracy** Mail and wire fraud

Sufficient evidence supported defendant's conviction for conspiracy to commit wire fraud arising from overbilling association, which her husband was executive director of, for use of federal hurricane relief funds to reimburse

expenses of after-school and summer program for at-risk children, and to use the funds for personal use, even though defendant did not handle reimbursement requests; defendant operated program with her daughter, who submitted the reimbursement requests, defendant was integrally involved in the functioning of the program, without which a substantial portion of the overbilling scheme would not have been possible, and defendant knew that hurricane money was traveling from association into accounts of church that her husband operated, which she then used for personal expenses.

[14] **Sentencing and Punishment** False pretenses and fraud

Federal Sentencing Guidelines' two-level enhancement for offenses involving misrepresentation that defendant was acting on behalf of a charitable, educational, religious, or political organization, or government agency, applies if a defendant lied about having any connection to a listed organization or if a defendant had authority to act for a charity but diverted some of the funds the nonprofit received for personal gain. U.S.S.G. § 2B1.1(b)(9)(A).

[15] **Sentencing and Punishment** False pretenses and fraud

Federal Sentencing Guidelines' two-level enhancement for offense involving misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency, applied to defendant convicted of conspiracy to commit wire fraud arising from fraudulent reimbursement requests, by after-school and summer program for at-risk children that she helped operate, to association that administered federal hurricane relief funds, even though coconspirators solicited the funds and defendant did not, because, under the Guidelines, defendant was responsible for foreseeable acts of her coconspirators, and the requests for government funds were foreseeable, indeed integral, parts of the conspiracy. U.S.S.G. §§ 1B1.3(a)(1)(B), 2B1.1(b)(9)(A).

[16] **Sentencing and Punishment** Oral and written pronouncements

Defendant's constitutional right to be present at sentence requires that oral pronouncement of a sentence control over a conflicting written judgment.

[17] **Sentencing and Punishment** Oral and written pronouncements

A true conflict between oral pronouncement of sentence and written judgment is not required for purposes of requirement that oral pronouncement control over conflicting written judgment; including an unpronounced aspect of the sentence in the written judgment may broaden the oral sentence and thus conflict with it.

[18] **Criminal Law** Sentencing proceedings in general

Criminal Law Sentencing

Without adequate notice, discrepancies between the written judgment and the oral pronouncement of sentence are reviewed for abuse of discretion; with it, they are reviewed for plain error.

[19] **Sentencing and Punishment** Announcement of and advice as to conditions

Mandatory and standard conditions of supervised release are implicit in the very nature of supervised release and need not be recited orally at sentencing; in contrast, special conditions are ones that may be appropriate on a case-by-case basis, and that ad hoc applicability warrants putting defendants on notice at sentencing by reading special conditions aloud. U.S.S.G. §§ 5D1.3(a), 5D1.3(c), 5D1.3(d).

[20] **Sentencing and Punishment** Announcement of and advice as to conditions

When a special condition on supervised release is recommended under Federal Sentencing Guidelines, it is essentially a standard condition and thus need not be orally pronounced at sentencing. U.S.S.G. § 5D1.3(d).

[21] **Sentencing and Punishment** Time, stage, or character of proceedings

Sentencing and Punishment Announcement of and advice as to conditions

District court's failure to orally recite access-to-financial-information condition of supervised release at sentencing for defendants convicted of conspiracy to commit wire fraud did not violate defendants' right to be present at sentencing; the condition was recommended, under provision of Federal Sentencing Guidelines setting forth conditions of supervised release, when restitution is ordered, which it was for each defendant, and thus it was standard condition. U.S.S.G. § 5D1.3(d)(3).

[22] **Criminal Law** Admissibility of evidence; arrest and search

Sentencing and Punishment Conflict in record

Conflict existed, at sentencing for defendants convicted of wire fraud conspiracy, between written judgments and no-new-credit condition on supervised release, which was implicit in defendants' oral sentences because it was recommended condition when restitution was ordered, which it was for all defendants, and thus remand for district court to reform written no-new-credit condition to match the one implied by oral sentence of restitution was warranted; Guidelines version prohibited new credit unless defendant was in compliance with the payment schedule, but defendants' written judgments set up a monthly payment schedule and prohibited new credit unless payment had been made in full, thus broadening the extent of the prohibition. U.S.S.G. § 5D1.3(d)(2).

[23] **Sentencing and Punishment** Conflict in record

Written special condition on supervised release for defendants convicted of wire fraud conspiracy, requiring defendants to pay any financial penalty imposed by judgment, did not conflict with oral sentence, since requiring defendants to make payments was consistent with, if not essential to, imposed penalty of restitution. U.S.S.G. § 5D1.3(a)(6).

[24] **Sentencing and Punishment** Conflict in record

Written special condition on supervised release for defendants convicted of wire fraud conspiracy, for whom restitution was ordered, that prohibited defendants from participating in any form of gambling until full payment was made conflicted with oral sentence, and thus vacatur of the condition was warranted; Federal Sentencing Guidelines did not include no-gambling condition as condition recommended if restitution was ordered, and forbidding gambling was not so clearly consistent with an oral pronouncement of restitution as to be reasonably encompassed in that pronouncement. U.S.S.G. § 5D1.3(d).

***383** Appeals from the United States District Court for the Eastern District of Texas, Ron Clark, U.S. District Judge

Attorneys and Law Firms

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Kevin Blake Ross, Law Office of Kevin B. Ross, P.C., Dallas, TX, for Defendant-Appellant Anita Diggles.

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

Opinion

GREGG COSTA, Circuit Judge:

***384** Multiple hurricanes—especially Rita and Ike—ravaged the eastern Texas Gulf Coast in the first decade of this century. Untold millions in federal disaster assistance helped rebuild those communities. But some people took advantage of that taxpayer generosity. A jury found that was the case for the three family members charged with fraud in this case: Walter and Rosie Diggles and their daughter Anita.

All three now argue that there was insufficient evidence to convict them. They also contend that, if their convictions were valid, four conditions of their supervised release must be vacated because the district court did not read them aloud at sentencing. We affirm their convictions and two of the disputed conditions, remanding to adjust one condition and remove another.

I.

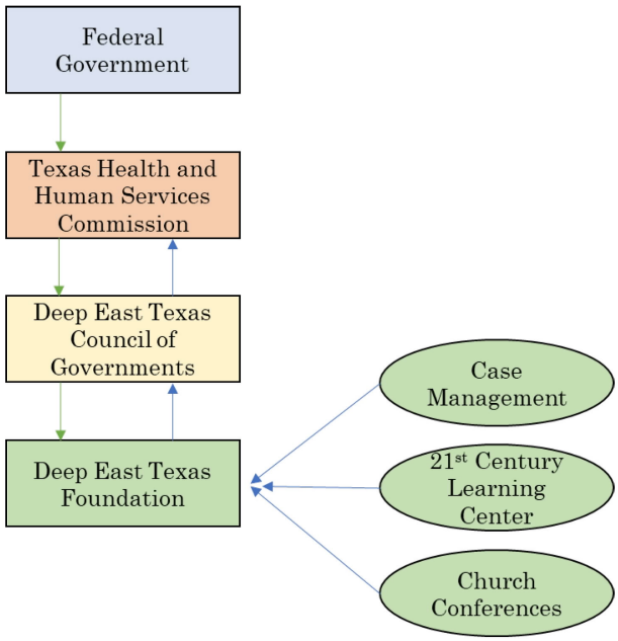
The Deep East Texas Council of Governments (DETCOG) is an association of local governments in a twelve-county area near the Louisiana border.[1] Using federal and state grants, DETCOG funds programs geared toward housing, the elderly, and the disabled, among other efforts. It also administers federal hurricane-relief funds.

Congress responded to Hurricanes Katrina and Rita, and later Dolly and Ike, by appropriating block grants for relief efforts. The Texas Health and Human Services Commission administered the funds the state received. DETCOG in turn received millions of those dollars, which it used to reimburse various service providers in east Texas.

One of those providers was the Deep East Texas Foundation. The Foundation operated in Jasper out of the New Lighthouse Church of God in Christ. It sought and received reimbursements from DETCOG for a variety of services, including "case management" (counseling and assisting individuals in need of individual financial support); the 21st Century Learning Center (an after-school and summer program for at-risk children); and annual conferences hosted by the New Lighthouse Church. A "vendor agreement" between DETCOG and the Foundation set reimbursement rates for several services, including case management and education.

A chart may be helpful. The green arrows represent the flow of federal funds. The blue arrows represent the chain of reimbursement requests.

***385**



Walter Diggles wore many hats in this reimbursement chain. He (1) ran DETCOG as its executive director; (2) was the founder of the Foundation and had signature authority over its bank account; and (3) was the pastor at the New Lighthouse Church, out of which the Foundation operated its programs. Also, one of those programs—the Learning Center—was run by his wife Anita and daughter Rosie.

Walter's multiple roles enabled the fraud. Once the hurricane funds left the state agency, Walter could control them the rest of the way. And all it took for the state to send money was for Walter to certify that DETCOG was using the money properly. For each request for Katrina and Rita funds, Walter would certify that "all outlays" were "for the purposes set forth" in the grant agreement. For the Dolly and Ike grants, he would certify that DETCOG had "completely verified the supporting information/evidence" from its vendors so as to "justify the amounts set forth" in the requests for further funding.

But the programs' expenses did not support many of the amounts DETCOG sought. Here are some examples:

The Learning Center: The Foundation's vendor agreement called for reimbursement for "Education & Training" at between $ 48 and $ 144 per "unit" (the Learning Center treated an hour of instruction as a unit). But the Learning Center's teachers were paid less than $ 20 per ***386** hour. Anita nevertheless prepared paperwork requesting reimbursement at rates as high as $ 110 per hour. The Foundation sent that paperwork to DETCOG, where Walter would sign off. The rate inflation added up: Between 2009 and 2011, the Foundation got roughly $ 240,000 for education expenses, while paying its teachers less than $ 130,000.

The Learning Center's transportation costs tell a similar story. The vendor agreement did not set a unit rate for transportation, but the Learning Center charged one: at least $ 10, and sometimes as high as $ 17, per student for round-trip transportation to and from the Learning Center in vans. The designated pick-up areas were mostly in Jasper, and the few in surrounding communities were no more than 5–10 miles away. But the reimbursement rates meant the Foundation received, in one of the most extreme instances, nearly $ 7,500 for four days of transportation costs. Between 2008 and 2011, the Foundation billed north of $ 200,000 for transportation despite paying less than $ 30,000 in transportation-related expenses. The government acknowledges that those numbers do not include amounts paid to drivers, but Learning Center workers who drove the vans were paid around $ 8 an hour—nowhere near enough to account for the $ 170,000 discrepancy.

Case Management: The vendor agreement set rates for case management at, as with education, between $ 48 and $ 144 per hour. But one case manager testified he was paid just $ 10 an hour, and another testified she was paid $ 27. Between 2009 and 2011, the Foundation received $ 150,000 for case management expenses but paid case managers just $ 82,000.

2009 "Closeout": In 2009, the Foundation sought and received a "closeout" payment of $ 245,000 for unreimbursed expenses. That included a $ 116,000 request for the Foundation's 2008 payroll expenses. But this was double billing—the Foundation had already billed for payments to its workers throughout 2008.

2010 Conference: Walter's church held annual conferences, which one witness described as akin to revivals. In addition to worship, the conferences featured workshops on topics like single parenting and credit repair. For its 2009 conference, the Foundation sought and received reimbursement for 186 "units" of training (each workshop attended was a unit, and some attendees went to more than one workshop) at $ 48 each—a total reimbursement just shy of $ 9,000. By way of supporting documentation, the Foundation submitted the attendees' sign-in sheets, which reflected the workshops they went to.

For the 2010 conference, the Foundation got more than four times as much: $ 39,000. But the supporting documentation was a fabrication; it was a copy of the 2009 sign-in sheets with just a few additions. The purported attendees were the same, and the tops of both sets read "Annual Conference July 7-11, 2009." The difference was that some of the "2010" sign-in sheets had blank spots filled in to make it look like attendees went to additional workshops as well as those they attended in 2009.

2012 Conference: At its 2012 conference, the church performed health screenings. The screening equipment (cholesterol machines and glucometers that could be used any number of times, plus one-time-use blood sugar test strips) cost about $ 750. But the Foundation sought and received reimbursement at $ 144 for each of 61 people screened, or $ 8,784 total.

Where did the extra money go? Walter, Anita, and Rosie used it for personal expenses. Over 99% of the money in the Foundation's accounts was from hurricane ***387** relief. The Foundation transferred hundreds of thousands of those dollars into the New Lighthouse Church's accounts. And money in the church accounts went to pay the defendants' credit card bills, to write checks to cash or to family members, and to pay for other personal expenses.

The grand jury charged Walter with conspiracy to commit wire fraud, eleven counts of wire fraud, two counts of theft from a program receiving federal funds, and three counts of money laundering. It charged Rosie with the conspiracy count, ten counts of wire fraud, and a money laundering count. Anita was charged with only the conspiracy count. The jury convicted on all counts. The district court sentenced Walter to 108 months. Rosie and Anita received below-Guidelines sentences of 54 months. The district court also imposed terms of supervised release for each defendant and ordered Walter to

pay $ 1.33 million in restitution, with Rosie and Anita jointly and severally liable for just over $ 970,000.

II.

[1] **[2]** Each defendant argues that the government's evidence was insufficient to find them guilty. We review the evidence "in the light most favorable" to the verdict. *United States v. Miles*, 360 F.3d 472, 476–77 (5th Cir. 2004). We must affirm the verdict unless no rational jury could have found the defendants guilty beyond a reasonable doubt. *United States v. Njoku*, 737 F.3d 55, 62 (5th Cir. 2013).

A.

Walter challenges the sufficiency of the evidence for each count. We begin with his arguments that go to all counts and then consider his challenges to individual ones.

[3] Walter does not dispute that the Foundation asked for and received more than its expenses, but contends that doing so was allowed for two reasons. First, he argues that the Foundation charged rates set by its vendor agreement with DETCOG. But the jury had good reason to see the vendor agreement as part of the fraud, not a defense to it (to say nothing of the fact that it set rates for teachers and case managers but not, for instance, for transportation or health screenings). Walter's idea appears to be that negotiated rates cannot be fraudulently inflated. But he was essentially on both sides of the agreement—this was not an arm's length negotiation. Walter signed the vendor agreement for DETCOG in his capacity as executive director; he had the last word on the rates and on one occasion rejected an attempt by DETCOG employees to lower them. On the other side of the vendor agreement, while Walter did not sign on the Foundation's behalf (its president, R.C. Horn, did), Walter was the founder of the Foundation, had signature authority over its bank accounts, and pastored the church out of which it operated. There is also evidence that he held substantial sway over Horn. Walter thus controlled the agreed rates. That made the scheme a more sophisticated one, not a lawful one.

Walter's other argument for why the Foundation was allowed to bill above costs is based on federal guidance on how nonprofits should treat overhead costs. The contract between the Commission and DETCOG cites an OMB circular on accounting principles for nonprofits, which says that overhead costs may be allocated to reimbursements for services rendered under a grant. *See* Office of Mgmt. & Budget, Circular No. A-122, *Cost Principles for Non-Profit Organizations*, at 7 (2004) (allowing allocation of costs that are "necessary to the overall operation of the institution, although a direct relationship to any particular cost objective cannot be ***388** shown."). But even if some of the Foundation's rate inflation was to cover overhead costs allocated to the hurricane-relief grants, there is no reason to think that accounted for reimbursements so far above what the Foundation paid for those services. Plus, no one contemporaneously believed DETCOG was reimbursing the Foundation in part for overhead. One of DETCOG's managers for block-grant funds testified that DETCOG employees understood that reimbursements could not exceed a vendor's actual costs for services. Similarly, a memo from DETCOG's controller instructed that the Foundation's "hourly rate for education services and case management should not exceed actual costs." The Foundation's reimbursement requests, too, purported to bill for the "cost" of particular "allowable services," without any indication that overhead was included. The jury reasonably rejected Walter's overhead-cost defense.

Before getting into Walter's count-specific arguments, we address one more generally applicable issue: intent to defraud. Insufficient evidence of that intent would undermine most of Walter's convictions.[2] But there is plenty. Walter was the pastor of the church out of which the Foundation operated and sometimes paid the Foundation's employees. So there is good reason to conclude that Walter knew both what employees were being paid and at least the approximate costs of other services the Foundation provided. He nevertheless certified to the Commission that the Foundation's paperwork (which included inflated rates) justified the reimbursements. In one instance particularly revealing of Walter's intent, DETCOG employees grew concerned during 2009 about the Foundation's reimbursement rates. They decided to reduce them, but Walter instructed that they be put "back the way they were." It is hardly surprising that Walter wanted to keep the overbilling gap; he was its main beneficiary. Roughly $ 400,000 went from the Foundation to the church accounts, out of which Walter paid over $ 150,000 in credit card bills, paid off a $ 40,000 loan to an entity run by Walter and his son, and made numerous checks out to family members and to cash. The evidence paints a compelling picture of Walter's intent to defraud.

[4] **[5]** Moving on to his count-specific arguments, Walter argues that the email that is the interstate wire for his first wire fraud count—one he sent conditionally approving reimbursement for the church's 2010 annual conference—did not involve a misrepresentation. This misunderstands the wire requirement. The wire "need not contain a falsehood"; it need only further the fraud scheme (which itself must involve lies). *United States v. Hoffman,* 901 F.3d 523, 545–46 (5th Cir. 2018). The Count 2 email advanced the fraud as it put the Foundation one step closer to obtaining government funds for the 2010 conference. *See id.* at 547 (holding that an email that was "a step in verifying" costs submitted to the government furthered a fraud scheme). And we have already explained that the overall fraud scheme contained numerous misrepresentations related to costs, including the ultimate submission of fabricated paperwork to support requests related to the 2010 conference.

***389** **[6]** Walter's other ten wire fraud convictions involve interstate transfers from the church's main bank account to his credit cards. These likewise furthered the fraud. Indeed, to the fraudster, obtaining the proceeds is not just part of the fraud, it is the reason for it. *See United States v. Vilar*, 729 F.3d 62, 95 (2d Cir. 2013) ("In as much as [the defendant] used the wire transfers to send the money to his own account, the wire transfers were undoubtedly in furtherance of the scheme to defraud."). There is sufficient evidence for all the wire fraud convictions.

[7] Next, Walter disputes his two convictions for theft from a program receiving federal funds. That crime occurs when an agent of a federally funded entity steals or "knowingly converts" at least $ 5,000 of the organization's property. 18 U.S.C. § 666(a)(1)(A). The first of these counts was based on the 2010 conference (the one with the fabricated sign-in sheets), and the second was based on the 2012 conference (the one with the health screenings). As to the 2010 conference, we reject Walter's argument that he was unaware of the phony documentation. Along with the evidence generally showing that Walter orchestrated the overbilling scheme, Walter approved reimbursements for both the 2009 and 2010 conferences despite the nearly identical supporting paperwork. When the $ 39,000 in federal funds arrived at the Foundation, Walter promptly wrote a $ 39,000 check to the church days later.

For the 2012 conference, Walter instructed the Foundation's president (Horn) to cut a $ 7,500 check to a health service run by Walter's sister as part of the reimbursement. Horn did as he was told, but Walter deposited the check into the main church account, which he essentially used as a personal account. That conversion, combined with the evidence that the Foundation received over $ 8,000 in reimbursement for health screenings that cost it less than $ 1,000, supports the conviction.

[8] **[9]** We last address Walter's money laundering convictions. A section 1957 crime occurs when a defendant engages in a financial transaction with property worth over $ 10,000, knowing that the property was derived from unlawful activity. *United States v. Alaniz*, 726 F.3d 586, 602 (5th Cir. 2013). The statute does not require concealment of funds, *id.*, so Walter's objection on that ground fails. But his argument that the charged funds did not come from unlawful activity (or at least that he did not know that) do target an element of the offense. We consider those objections to each count.

[10] The first money laundering count involves deposits Walter made following the 2010 conference. We have already addressed Walter's knowledge of the fabrication underlying that reimbursement. When, armed with that knowledge, Walter deposited the $ 39,000 check from the Foundation he violated section 1957.

The next two counts relate to the 2009 "closeout" reimbursement, the one that double billed for the Foundation's 2008 payroll. Walter used some of these federal funds to purchase CDs, which he later cashed and deposited back into the church account. For the reasons we have already recited demonstrating Walter's involvement in, indeed leadership of, the fraud, the jury could find that he was not oblivious to the unlawful source of these funds. Walter's transactions with the closeout funds support his section 1957 convictions.[3]

We uphold each of Walter's convictions.

***390** B.

We now move to Anita, who was charged and convicted only of conspiracy. We have already explained that the evidence supports the jury's finding that Walter orchestrated a scheme to defraud. The sufficiency question for Anita is whether she agreed to participate in it, with the intent that it succeed. *See United States v. Simpson*, 741 F.3d 539, 547 (5th Cir. 2014).

[11] **[12]** Direct evidence of an agreement to commit a crime is rare, so circumstantial evidence often proves a

conspiracy. There is enough of that type of evidence here —in the form of concerted action, knowledge of the fraud, and profiting from it—to support the conviction. Anita and Walter worked together to make the overbilling happen: Anita administered the Learning Center, submitting the inflated reimbursement requests, which Walter signed off on. *See United States v. Curtis*, 635 F.3d 704, 719 (5th Cir. 2011) (noting that "concerted action" is evidence of agreement). Anita knew about the overbilling. As the person overseeing the Learning Center, Anita could see both sides of the ledger. She authorized pay for teachers, signed checks for fuel, and knew what the drivers were paid. But she requested reimbursement at higher "cost per unit" rates. Last but not least, she benefitted from the fraud, using the proceeds to pay for her car and rent among other things. *See id.* at 719 (recognizing that receiving a substantial share of a fraud conspiracy's proceeds is evidence of involvement). The jury reasonably found Anita guilty of conspiracy.

C.

Rosie challenges her convictions for conspiracy and wire fraud. Her case is closer than Anita's. Both were supervisors at the Learning Center, and there is evidence that Rosie too knew what its actual costs were. Yet unlike with Anita, there is no evidence that Rosie handled reimbursement requests. That is, while Anita knew and facilitated both sides of the ledger, Rosie appears only to have participated in the Learning Center's operations, not its funding.

[13] But as long as the evidence supports a reasonable inference that Rosie knew of the overbilling scheme, her "minor participation" in it can support her convictions. *United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009). Rosie was at the Learning Center daily and told employees what to do. She made hiring decisions and ran staff meetings. Rosie was thus integrally involved in the functioning of the Learning Center, without which a substantial portion of the overbilling scheme would not have been possible. If Rosie knew that Anita was submitting inflated reimbursement requests for Walter to sign off on, the jury could conclude from her supervision of the Learning Center that she had agreed to help facilitate the fraud.

Although the proof of Rosie's knowledge is weaker than it is for the other defendants, it is enough for us to uphold the verdict of the jury that sat through this nine-day trial. Rosie was married to one ***391** conspirator, and her daughter was another. Those family ties are insufficient on their own to prove she joined the conspiracy, but they are one factor that can be considered along with other indications that she knew about the fraud. *United States v. Willett*, 751 F.3d 335, 340 (5th Cir. 2014). Foremost among that additional evidence, Rosie knew that hurricane money was travelling from DETCOG into the church accounts, which she then used for personal expenses. Rosie admitted that she knew Walter ran DETCOG and that the Foundation got grant funds from DETCOG. She also knew that money in the church accounts came from the Foundation; on one occasion, she deposited a $ 30,000 check from the Foundation into the church's youth department account. She had signature authority on that account, almost all the money in which came from the Foundation, as well as the church's main account. The jury could infer from her access to those accounts that she knew the church received hundreds of thousands of dollars from the Foundation.

She also benefitted from the fraud. In addition to what she derived from Walter's use of proceeds to pay credit card bills, Rosie made around $ 13,000 in cell phone payments (among others) from the youth department account. She also made $ 15,500 in credit card payments from the account for her ministry, "Heart to Heart," where nearly all the money came from the youth department account.[4] In the absence of overbilling, there would have been no money left over for personal expenses like these. Rosie's awareness and use of the extra cash coming from the Foundation supports the inference that she knew the Foundation was overbilling.

Statements Rosie made to the FBI could also be one of the puzzle pieces that the jury concluded fit together to show guilt. When asked about Walter's role at the Foundation, Rosie said that Walter had nothing to do with it beyond providing advice when requested, and specifically that Walter did not help the Foundation get any grant money. She also said that the money in the Heart to Heart account came from donations—that is, not the Foundation. The jury could have taken those false statements to indicate that Rosie knew she ought to hide her awareness of the scheme. *See United States v. Villarreal*, 324 F.3d 319, 325 (5th Cir. 2003).

We uphold each of Rosie's convictions.

III.

[14] **[15]** Only Rosie appeals the prison time she received. She argues that the district court misapplied a two-level

enhancement added when "the offense involved ... a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency." U.S.S.G. § 2B1.1(b)(9)(A). The enhancement clearly applies if a defendant lied about having any connection to a listed organization. Less obviously, it also applies if a defendant had authority to act for a charity but diverted some of the funds the nonprofit received for "personal gain." *Id.* cmt. n.8(B); *see United States v. Reasor*, 541 F.3d 366, 372 (5th Cir. 2008). That is the basis for the enhancement here.

Rosie argues that although Walter solicited funds for DETCOG, and Anita solicited funds for the Learning Center, she never solicited funds so could not have ***392** made a covered misrepresentation. This ignores that the Guidelines hold Rosie responsible for the foreseeable acts of her coconspirators. U.S.S.G. § 1B1.3(a)(1)(B). The requests for government funds were foreseeable, indeed integral, parts of the conspiracy. As we have upheld Rosie's conviction as a coconspirator, Walter's and Anita's solicitations are attributable to her. There was no Guidelines error.

IV.

Each defendant challenges the four special conditions of supervised release listed in their judgments. These conditions require each defendant to: (1) "pay any financial penalty that is imposed by the judgment"; (2) "provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and employment"; (3) "not incur new credit charges or open additional lines of credit without the approval of the probation officer" until full payment is made; and (4) "not participate in any form of gambling" until full payment is made. The defendants' objection is that the district court did not officially recite these conditions at sentencing. Instead, the judge told them that the conditions recommended in their Presentence Reports, which included the four special conditions, would be conditions of their supervised release. He even identified the page numbers of the PSRs listing the conditions. The government nonetheless concedes that by failing to "orally recite the special conditions one by one," the district court erred, warranting removal of the four special conditions from the defendants' judgments.

[16] **[17]** The requirement that a judge orally state a sentence is a product of the defendant's constitutional right to be present at sentencing. *United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001). To preserve that right, the oral pronouncement controls over a conflicting written judgment. *United States v. Mudd*, 685 F.3d 473, 480 (5th Cir. 2012). A true conflict is not required; including an unpronounced aspect of the sentence in the written judgment may "broaden" the oral sentence and thus "conflict" with it. *United States v. Rivas-Estrada*, 906 F.3d 346, 350 (5th Cir. 2018). We have been strict about this requirement, recently holding that a district court abused its discretion in telling the defendant only that the conditions listed in the PSR would be imposed. *Id.* at 350–51.

[18] *Rivas-Estrada* is difficult to reconcile with older caselaw holding that written notice of the conditions at sentencing suffices. *See United States v. Rouland*, 726 F.3d 728, 734 (5th Cir. 2013) (upholding practice in which the government moves at sentencing to admit an exhibit listing special conditions, even though the court does not individually recite them); *see also United States v. Al Haj*, 731 F. App'x 377, 379 (5th Cir. 2018) (finding no error when defendant signed a paper listing the conditions). The need for notice underlies the oral pronouncement requirement. *Rouland*, 726 F.3d at 733–34 (5th Cir. 2013).[5] When a sentencing judge makes no mention, either directly or indirectly, of a condition, ***393** the lack of notice deprives the defendant of an opportunity to object. But the defendant has that opportunity when the court referred to a list of the conditions being imposed. *Id.* at 734.

The only difference between this case and *Rouland* is that the referenced lists of the Diggles' conditions were their Presentence Reports rather than a separate document. It is hard to see why that makes a difference. *But see Rivas-Estrada*, 906 F.3d at 349–50 (framing the district court in *Rouland* as having done "more than the minimum" by offering a "unique chance to object"). One of the first questions a court typically asks at sentencing is whether the defendant has reviewed the PSR. The court followed that standard script in this case. As the key sentencing document, the PSR is also available at the hearing. The defendant thus has written notice of the conditions and an opportunity to object both when a court refers to a list in the PSR (especially when it does so by page number as happened here) and when it refers to *Rouland*'s separate exhibit listing the conditions.

But we are bound to follow *Rivas-Estrada*'s view that referring to the PSR is not enough, which is why the government concedes. We are not, however, required to

follow the government's overall concession on this issue. *United States v. Hope*, 545 F.3d 293, 295 (5th Cir. 2008). Our "independent review," *id*., reveals no conflict between the oral sentence and the written one for three of the disputed special conditions. One of them is so obviously in tune with the oral sentence that it cannot be said to have created a conflict. Two others, despite being described as special conditions, are actually standard conditions (though one needs a slight adjustment). And an unannounced standard condition does not create a conflict. *Rivas-Estrada*, 906 F.3d at 348.

[19] At this point, some background on the types of supervised release conditions is useful. Mandatory conditions are required by statute. U.S.S.G. § 5D1.3(a). Standard conditions are "recommended" in all circumstances. *Id.* § 5D1.3(c). As both are "implicit in the very nature of supervised release," they are presumed to be part of the judgment and need not be orally pronounced. *United States v. Torres-Aguilar*, 352 F.3d 934, 936 (5th Cir. 2003) (quoting *United States v. Truscello*, 168 F.3d 61, 62 (2d Cir. 1999)). In contrast, special conditions are ones that "may be appropriate" on a case-by-case basis, U.S.S.G. § 5D1.3(d), and that ad hoc applicability warrants putting defendants on notice at sentencing by reading special conditions aloud.

[20] The key is that sometimes a condition labeled special is really a standard condition. *See Rouland*, 726 F.3d at 735 ("[S]pecial conditions may be tantamount to standard conditions under the appropriate circumstances, thereby precluding the need for an oral pronouncement."). Aside from being potentially "appropriate" in any case, the special conditions in section 5D1.3(d) are "recommended" in certain circumstances. And when a condition is recommended, it is essentially a standard condition and thus need not be orally pronounced. *Torres-Aguilar*, 352 F.3d at 937–38. That the Guidelines would still call that condition special is "irrelevant." *Id.* at 937 (quoting *United States v. Asuncion-Pimental*, 290 F.3d 91, 94 (2d Cir. 2002)).

[21] Under this principle, the access-to-financial-information condition is a standard condition. It is recommended by section 5D1.3(d) when restitution is ordered, which it was for each defendant. U.S.S.G. § 5D1.3(d)(3). As a result, the district court did not err in failing to recite this standard condition at sentencing.

***394** **[22]** The Guidelines also recommend a no-new-credit condition when restitution is ordered. U.S.S.G. § 5D1.3(d)(2). So a prohibition on new credit was implicit in the defendants' oral sentences. But the Guidelines version prohibits new credit "unless the defendant is in compliance with the payment schedule." *Id.* The defendants' written judgments set up a monthly payment schedule but, in contrast to the Guidelines, prohibit new credit "unless payment ... has been made in full." The written judgments thus broaden the extent of the prohibition; under the Guidelines version, the defendants could open new lines of credit so long as they keep up with their payments, but under the written judgment, they can open new lines of credit only once they pay the full amount of restitution. We remand for the district court to reform the written no-new-credit condition to match the one implied by the oral sentence of restitution—that is, the Guidelines version. *See United States v. Mireles*, 471 F.3d 551, 558 (5th Cir. 2006) ("If a conflict exists, the appropriate remedy is remand to the district court to amend the written judgment to conform to the oral sentence.").

[23] As for the condition requiring payment of financial penalties, we do not see how it could conflict with an oral sentence imposing those penalties. *See United States v. Warden*, 291 F.3d 363, 365 (5th Cir. 2002) (explaining that a written condition does not conflict with an unpronounced condition if the condition "is clearly consistent with the district court's intent ... as evidenced in the statements made by the court at the sentencing hearing"). Requiring a defendant to make those payments is consistent with, if not essential to, those penalties. Indeed, a "special" condition requiring payment of restitution is largely unnecessary. Making restitution payments is a mandatory condition of supervised release, as the defendants' written judgments also reflect. U.S.S.G. § 5D1.3(a)(6). This may show that the "special" condition was for the most part redundant (it just adds payment of the special assessment, an amount that pales in comparison to restitution), but it also shows that it does not conflict with the rest of the sentence.

[24] We do, however, vacate the no-gambling condition. The Guidelines do not include it as a condition recommended if restitution is ordered. And forbidding gambling is not so "clearly consistent" with an oral pronouncement of restitution as to be reasonably encompassed within that pronouncement. *Contrast Warden*, 291 F.3d at 365 (holding that a written condition requiring defendant to pay for drug treatment was clearly consistent with a pronounced condition requiring the defendant to get drug treatment).

* * *

We AFFIRM the judgments of conviction, VACATE the "no-new-credit" and "no-gambling" conditions for the supervised release terms, and REMAND for the district court to amend its written judgments by (1) reforming the no-new-credit condition to conform to section 5D1.3(d)(2) of the Guidelines, and (2) removing the no-gambling condition.

All Citations

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Footnotes

1 We recite the facts in the light most favorable to the government given the guilty verdicts.

2 *See United States v. Simpson*, 741 F.3d 539, 547 (5th Cir. 2014) (fraud conspiracy under 18 U.S.C. § 1349 requires proof of intent to defraud); *United States v. Hoffman*, 901 F.3d 523, 545 (5th Cir. 2018) (same for substantive wire fraud). Walter's money laundering convictions required that the funds he transacted came from a "specified unlawful activity." 18 U.S.C. § 1957. The grand jury alleged the fraud conspiracy as that activity, so those convictions also require intent to defraud.

3 Walter's deposits into the church's bank account were "monetary transactions" under section 1957. *See* 18 U.S.C. § 1957(f)(1). And although Walter does not raise the issue of distinguishing the proceeds of the fraud from the subsequent deposits of those proceeds, we note that the fraud was complete once the overbilled funds hit the Foundation's account, over which Walter had signature authority. *See United States v. Leahy*, 82 F.3d 624, 635 (5th Cir. 1996) ("Fraudulent schemes produce proceeds, 'at the latest when the scheme succeeds in disgorging the funds from the victim and placing them into the *control* of the perpetrators.' ") (quoting and emphasizing *United States v. Allen*, 76 F.3d 1348, 1361 (5th Cir. 1996)). The fraud got the money into the Foundation's account; the money laundering got it into the church's.

4 These credit card and phone payments were the bases for Rosie's ten individual wire fraud convictions. As we find enough evidence that she joined the scheme to defraud, these payments were one way she received the benefit of that fraud. They thus furthered the scheme and support her wire fraud convictions. *See Vilar*, 729 F.3d at 95.

5 More precisely, whether the defendant had notice of a special condition determines the standard of review. Without adequate notice, discrepancies between the written judgment and the oral pronouncement are reviewed for abuse of discretion; with it, they are reviewed for plain error. *Rivas-Estrada*, 906 F.3d at 348–49; *Rouland*, 726 F.3d at 733–34. But this determination is the "critical" one. *Rivas-Estrada*, 906 F.3d at 348; *see Rouland*, 726 F.3d at 734 (accepting defendant's concession that an unpronounced special condition did not affect his substantial rights, as necessary for reversal under plain error review).